No. 14874.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES W. HOFFRITZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
Assistant United States Attorney,
Chief, Criminal Division,

CECIL HICKS, JR.,
Assistant United States Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee,
United States of America.

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I.
STATEMENT OF JURISDICTION.

This action was begun in the District Court with the filing on January 4, 1955 of an action captioned "Complaint for Temporary Restraining Order and Injunction —Suppression of Evidence, and Demand for Jury Trial." The complaint was accompanied by a "Motion for Preliminary and Temporary Injunction" [Tr. p. 9] and "Affidavit in Support of Motion for Preliminary and Temporary Injunction" filed by appellant [Tr. p. 10]. Affidavits were filed on behalf of all parties. On March 29, 1955, the District Court entered an "Order on Motion

under Rule 41(e) of Federal Rules of Criminal Procedure" [Tr. p. 50] which denied appellant all relief sought. Findings of Fact and Conclusions of Law were made [Tr. pp. 54-58] and on April 19, 1955 judgment was entered accordingly [Tr. pp. 58, 59]. Appellant made a Motion for New Trial [Tr. p. 60] which motion was denied [Tr. pp. 66-67]. Notice of Appeal was filed June 27, 1955 [Tr. p. 67].

The District Court had jurisdiction of this cause of action under Rule 41(e) of the Federal Rules of Criminal Procedure, Title 18, United States Code, and this Court has jurisdiction under Section 1291, Title 28, United States Code.

II.
STATUTE INVOLVED.

Rule 41(e) of the Federal Rules of Criminal Procedure, Title 18, United States Code, provides in pertinent part:

> "(e) Motion for Return of Property and to Suppress Evidence.
>
> "A person aggrieved by an unlawful search and seizure may move the District Court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant . . ."

III.
STATEMENT OF THE CASE.

In essence, appellant contended in the District Court that his consent to examine his books and records was obtained by Special Agent Irwin R. Weiss of the Internal Revenue Service by deceit.

The facts viewed most favorably to appellant, as revealed in his affidavit, reveal that on or about April 14, 1953 Agent Weiss visited appellant's office at the Glo-Dial Clock Company. Appellant was not present but his employee, Dorothy Varble, telephoned him and said, "There was a government man in the office who wanted to look at the books." [Tr. p. 35.] According to appellant he then spoke to Agent Weiss over the telephone and "Mr. Weiss said that he wanted to look over the books for 1947 and 1948 again." Certain books were thereafter made available to Mr. Weiss and during the ensuing two or three week period he visited appellant's office almost daily. At one point during the investigation appellant was asked if he had a copy of his 1952 income tax return. [Tr. p. 32.]

The affidavit of Special Agent Weiss, supported by the affidavit of Mrs. Dorothy Varble, appellant's bookkeeper and employee at the time, reveals that when Agent Weiss first visited the office on April 14, 1953, he advised appellant over the telephone that he had been assigned to conduct an investigation of appellant's income tax liabilities and that appellant told Agent Weiss that he could have all his books and records for examination. [Tr.

p. 15.] Appellant then instructed Mrs. Varble by telephone to give Agent Weiss "whatever he wanted." [Tr. p. 24.] Certain records were then turned over to Agent Weiss and when appellant arrived at the office later that morning Agent Weiss advised him that he was conducting an investigation of this income tax liabilities for the year 1948 through 1951 and exhibited to appellant his credentials which revealed he was a special agent of the Treasury Department. [Tr. p. 16.] During the course of the examination appellant was extremely friendly to Agent Weiss and made all his records available to him including his 1952 income tax return. [Tr. pp. 17, 25, 26.] Agent Weiss neither attempted, nor did in fact, deceive or misrepresent his capacity and purpose to appellant. [Tr. p. 18.] The investigation of appellant's books and records revealed no evidence of fraud, but later investigation outside of the books and records revealed large amounts of unreported income. [Tr. p. 19.]

Special Agent Weiss also filed an affidavit which described his duties as a special agent of the Intelligence Division, Internal Revenue Service. [Tr. pp. 38, 41.] It revealed that out of several hundred "preliminary" investigations—the type he had begun in appellant's case—only a handful result in criminal prosecution. [Tr. p. 40.] Further, both "Special" agents and "Revenue" agents conduct preliminary investigations. [Tr. p. 39.]

IV.

APPELLANT'S SPECIFICATIONS OF ERROR.

At pages 4 through 6 of Appellant's Opening Brief, he has made the following specifications of error:

"(1) Holding that appellant's civil action was a motion for return of property and to suppress evidence pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, instead of following Rule 56 of the Federal Rules of Civil Procedure;

"(2) Holding that the action arises out of the District Court's power to discipline an officer of the court and is equitable in nature, and that pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, the motion should be heard and tried upon the facts by the court, without a jury;

"(3) Finding that appellant gave Special Agent Weiss permission to examine his books and records and imposed no limitation on his consent;

"(4) Holding that the failure of Special Agent Weiss to advise appellant of his rights under the United States Constitution, Amendment V, not to be a witness against himself, does not render appellant's consent to examine his books involuntary;

"(5) Holding that the failure of Special Agent Weiss to advise appellant that a criminal investigation was pending was not a strategem amounting to unlawful search and seizure within the meaning of the United States Constitution, Amendment IV;

"(6) Holding that appellant, as a reasonable man, is held to understand that when he gave his permission to inspect his books and records to an investigator charged with enforcing the law, and placed no limitations on such permission, he permits the

inspection for all purposes relevant to the inquiry, including evidence of wilful tax evasion;

"(7) Holding that appellant's right to be free from unlawful search and seizure under the United States Constitution, Amendment V, was not violated;

"(8) Holding that appellant was not involuntarily compelled to be a witness against himself;

"(9) Holding that appellant's consent to examine his books and records was voluntarily and understandingly made, was not revoked, and continued to be voluntary during the period of investigation of his books and records by Special Agent Weiss;

"(10) Finding that appellant's civil action for the return of personal property was a motion pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure;

"(11) Hearing the matter upon affidavits, depriving appellant of the trial of a civil action upon oral evidence and its merits.

"(12) Denying appellant's motion for a temporary injunction restraining the appellees from doing any of the acts mentioned in Paragraph 1 of appellant's prayer for relief in his complaint;

"(13) Refusing to order the return of all transcripts of books, papers, documents, records, and information obtained therefrom by Special Agent Irwin R. Weiss and belonging to appellant;

"(14) Refusing to order the suppression of all of the property mentioned in Paragraph (13) herein as evidence."

V.
ARGUMENT.

POINT ONE.

The Jurisdiction of the District Court.

Appellee does not dispute the *fact* of jurisdiction in the District Court to entertain appellant's motion and grant the relief sought in an appropriate case.

> *Freeman v. United States* (9th Cir., 1946), 160 F. 2d 69.

However, most of the courts which have passed upon such actions have not made clear the exact basis of jurisdiction. Prior to the adoption of the Federal Rules of Criminal Procedure, there was no express provision in federal law for the suppression and return of evidence obtained illegally without a search warrant. Former Section 626 of Title 18, United States Code, was not broad enough in its terms to cover such situations. The result, therefore, was that the courts resorted to such expressions as "the inherent power of the court" to discipline its officers.

> *Go-Bart Importing Co., et al. v. United States,* 282 U. S. 344 (1931).

Some of the language referring to the inherent power of the court was carried on into cases subsequent to the adoption of the Rules. Thereafter, in a case decided in 1952, the Fifth Circuit Court of Appeals, held Rule 41(e) of the Federal Rules of Criminal Procedure covered the preindictment situation. The court stated without further discussion in *White, et al. v. United States, et al.,* 194 F. 2d 215, 216:

> "This appeal is from an order denying petitions and motions filed by petitioners under Rule 41(e),

> Federal Rules of Criminal Procedure, 18 U. S. C. A., for the return of property and to suppress evidence."

This was followed by *Centracchio v. Garrity,* 198 F. 2d 382 (1st Cir., 1952), where the court observed that Rule 41(e) of the Federal Rules of Criminal Procedure made provision for pre-indictment motions to suppress evidence. In that case the court stated at page 387, discussing the district court's jurisdiction:

> "This rule does not specify the time when such a motion may be made, and presumably it is broad enough to sanction the filing of such a motion in a district court prior to indictment."

It thus appears that with the adoption of the rules, a specific statutory provision was made for a motion to suppress evidence and return property, taken illegally without a warrant, prior to indictment. Rule 41(e) provides:

> "A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained . . ."

In the instant case, appellant filed a "Complaint for Temporary Restraining Order and Injunction—Suppression of Evidence, and Demand for Jury Trial." [Tr. p. 3.] It is axiomatic, of course, that the title of a proceeding does not determine its character.

Freeman v. United States, supra.

Thus, the district court correctly ruled "that the action is properly to be treated as a motion pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure permitting 'motion for return of property and to suppress evidence.'" [Tr. pp. 50, 51.]

An order of a district court granting or denying a motion to suppress evidence and for the return of property, if made prior to the indictment, is a final decision and appealable.

United States v. Rosenwasser, 145 F. 2d 1015 (9th Cir., 1944);

Freeman v. United States, supra;

Weldon v. United States, 196 F. 2d 874 (9th Cir., 1952).

Nevertheless, the question arises in this case of whether the appeal has become moot by virtue of the return of an indictment against the appellant on August 31, 1955. [Tr. p. 75.] There is little authority on the subject. The First Circuit Court of Appeals discussed the problem in the *Centracchio* case, *supra,* and stated at pages 388 and 389:

> "We have considered somewhat whether the handing down of the indictment on February 21, 1952, rendered this appeal moot. It is a curious situation. The fact that the petition to suppress was filed as an independent proceeding prior to indictment was the only thing that made the district court's order thereon a 'final decision' appealable under 28 U. S. C. §1291. If the motion to suppress had been filed after indictment, for the sole purpose of procuring the exclusion of evidence at a forthcoming trial, an order denying such motion would not have been a 'final decision' but rather an unappealable interlocutory order entered in the course of the criminal case. Cogen v. United States, 1929, 278 U. S. 221, 49 S. Ct. 118, 73 L. Ed. 275. But presumably if the order of the district court was a 'final decision' when rendered, it did not lose that characteristic from the fact that an indictment was subsequently handed

> down. *Cf.* United States v. Poller, 2 Cir., 1930, 43 F. 2d 911. And though the finding of a true bill by the grand jury defeated one of the objects of petitioner in his motion to suppress, the petition did not thereby become entirely moot, for petitioner still remained interested in the relief sought in so far as it might be directed to the suppression of the evidence at the trial. Probably, therefore, as a technical matter, the present appeal should not be dismissed as moot."

On the other hand, logic strongly compels the conclusion that this appeal has, in fact, become moot. In the *Rosenwasser* case, *supra,* this court discussed the reasoning of the Supreme Court in *Cogen v. United States,* 278 U. S. 221 (1929). In both the *Cogen* and *Rosenwasser* cases, there was an appeal from a district court's order on a motion to suppress evidence and return property made after indictment. Both cases determine that such an order was not appealable. This court observed in the *Rosenwasser* case at page 1017:

> "The Supreme Court emphasized the fact that the suppression of evidence, not the return of the papers, was the principal purpose of defendant's application."

If this criteria is to be used to determine what is left of appellant's appeal in this case, then the appeal has become moot. While the complaint includes an action for the return of property, an examination of the affidavits of all parties reveals that no property was taken and thus, the action in this case is simply one to suppress evidence. Therefore, in the reasoning of the *Cogen* and *Rosenwasser* cases, a remedy remains available to the appellant in the district court.

POINT TWO.

No Constitutional Rights of Appellant Were Violated.

It should be noted at the outset that appellant is not here contending that there was an *actual* illegal search or inspection of his books. That is, appellant does not claim that there was an unlawful and surreptitious entry into his place of business. Appellant admits that he consented to an inspection of his books and records but contends that his consent was obtained by fraud.

It is indisputably settled law that no "warning" of constitutional rights is necessary before interviewing a prospective defendant or examining his books and records. A failure to give such a warning does not render his statements or the information gained from his records inadmissible in a later criminal prosecution.

Powers v. United States, 223 U. S. 303;

United States v. Burdick, 214 F. 2d 768 (C. C. A. 3, 1954);

Montgomery v. United States, 203 F. 2d 887 (C. C. A. 5, 1953).

In the *Burdick* case, at page 773, the Court said:

> ". . . The motion to suppress was based upon the claim that when the above data and information was submitted to Special Agent Gerson, the latter allegedly failed to warn the defendant that he did not have to testify against himself nor give any information that might be used against him in a criminal proceeding."

The "data and information" referred to included certain bank and brokerage records of the defendant, a net worth

statement and some oral admissions. The court then quoted from the *Powers* case to the following effect:

> "It is well settled that it is '. . . not essential to the admissibility of his [defendant's] testimony that he should first have been warned that what he said might be used against him', providing that the defendant's statement '. . . was entirely voluntary and understandingly given. Such testimony cannot be excluded when subsequently offered at his trial.' "

The *Montgomery* case, another income tax case, also involved a failure to warn of constitutional rights. The court said, page 893:

> "We do not think the circumstances under which the statements of the defendant and of his wife, and the cancelled checks and documents, were obtained were sufficient of themselves to require that that evidence be excluded on the ground of being involuntary as a matter of law, or to require that the Government's Exhibit 20 based in part upon such testimony be not admitted in evidence. All these circumstances were matters which went to the weight or credibility of the testimony thus obtained [citations]."

In another income tax case, *Turner v. United States,* 222 F. 2d 926 (C. C. A. 4, 1955), the court observed at page 931:

> "It has been expressly held time and again in tax evasion and other criminal cases that it is not essential to the admissibility of statements secured by officers of the law from a defendant that he should be first warned that the information might be used against him in a criminal case, provided that it was voluntarily and understandingly given . . . ."

The Ninth Circuit Court of Appeals has indicated its agreement with the cases just noted. In the income tax case of *Himmelfarb v. United States,* 175 F. 2d 924 (1949), the court said in discussing this problem at page 938:

> ". . . If a warning was necessary, *which we question,* we think the trial court's holding was correct." (Emphasis added.)

After this contention concerning "warning" was rejected time and again by the Circuit Courts of Appeals, the taxpayers accused of evasion took a slightly different tack: where fraud was suspected the failure to "warn" or the failure to advise the taxpayer that he was under suspicion amounted to a concealment, *i. e.,* fraud on the part of the government agents. Thus, they argue, the statements made by the taxpayer or his consent to examine his books and records becomes involuntary. That is the gist of appellants argument here. But it is only a different chorus to the same old song, and the Circuit Courts of Appeals have consistently rejected the contention.

Conspicuously absent from appellant's citations of authorities are the many income tax cases determining the exact point raised in this appeal. *Chieftain Pontiac Corp., et al. v. Julian, United States Attorney,* 209 F. 2d 657 (C. A. 1, 1954), involved a pre-indictment action to suppress evidence in a tax case where a taxpayer had made a voluntary disclosure. The court observed at page 659:

> "Even if the government agents obtained the voluntary disclosures from the appellants by the guile of a false representation that no investigation was pending and that appellants were therefore eligible to obtain the benefit of the Treasury's disclosure policy, still we think it could not be said that such

stratagem constitutes an unreasonable search and seizure within the meaning of the Fourth Amendment."

In the *Montgomery* case, *supra,* which was reversed on other grounds, the court disposed of this contention in the following language (p. 892):

". . . Special Agent Baskett testified that the defendant was never so warned and that he never at anytime told the defendant that any document that was surrendered to him or his fellow agents would be used in either a civil or criminal prosecution against him. The defendant testified that, when Baskett and Government Agent Wilson first came to see him about his income tax matters, they told him that it was a routine check-up, and that on each occasion he conferred with them, they told him it was purely a civil matter, that they would soon let him know how much taxes he owed, if any, and allow him to pay them and that at no time was it intimated to him that there might be a criminal prosecution . . ."

(P. 893):

"We do not think the circumstances under which the statements of the defendant and of his wife, and the cancelled checks and documents, were obtained were sufficient of themselves to require that that evidence be excluded on the ground of being involuntary as a matter of law . . ."

And in *Blumberg v. United States,* 222 F. 2d 496, 499 (C. A. 5, 1955):

"We are convinced, however, that the record, including the testimony of the defendant himself, contains no evidence supporting the claim made on this

appeal, that the examinations made of him, his books and records were conducted without his consent. . . .

"It is true that there was no expressed disclosure made that a purpose in obtaining the evidence was to proceed criminally against him. On the other hand, though defendant had undoubtedly hoped, and may have believed, that no criminal prosecution was intended, there was no representation made to him that the information sought was only for purposes of settling his civil liability. Under these circumstances, we think: that there was no obligation on the agents to inform him that the matters inquired about might be used in a criminal proceeding; . . ."

The Fourth Circuit Court of Appeals has ruled to the same effect in *Turner v. United States,* 222 F. 2d 926 (1955):

(P. 929): "Investigation by a special agent may or may not lead to a criminal prosecution, and in this case it was Forbes' duty and doubtless his intention to report any delinquencies which he might find to his superiors. He did not give any information on this point to the partners and on cross examination was unable to say whether or not he had told them that he was making a routine 'check-up'.

. . . . . .

(P. 930): "The contention seems to be that revenue agents who secure the consent of a taxpayer to an examination of his books with intent to obtain evidence and use it in a criminal prosecution, are guilty of deceit unless they divulge their purpose, and that the obtaining of information in such a manner violates the Fourth Amendment and its introduction into evidence violates the Fifth Amendment; . . .

. . . . . .

(P. 931): "At no time did the agents bring pressure to bear upon the defendants or conceal their identity or practice any deceit. The evidence is silent as to whether Agent Forbes began the investigation as a routine examination to ascertain the civil liability of the defendants or intended from the beginning to search for evidence of crime. *But even if the latter assumption be made, there was no violation of the taxpayer's constitutional rights.* The relevant inquiry is always whether the taxpayer freely gave his consent, and as to that there is no dispute in this instance." (Emphasis added.)

A particularly illuminating district court case from Pennsylvania is *United States v. Guerrina.* In an early opinion at 112 Fed. Supp. 126, the court suppressed certain evidence. That opinion is summarized by appellant in his brief at pages 23 and 24. However, the district court at 126 Fed. Supp. 609, modified its early decision and freed from suppression much of the material covered and at the same time brought its reasoning in line with the other authorities. At page 610, the court said:

". . . the question as to whether the defendant consented to the examination of his check-stubs and other records which he himself made available to the agents, without first being warned of his constitutional rights, is one that cannot be determined preliminarily as a matter of law but is one which must be determined as a question of fact by the jury at the trial."

The court then cites the *Burdick* and *Montgomery* cases and states:

". . . the facts in each of those cases clearly demonstrate that criminal prosecution was contemplated at the time the defendants were questioned by

special agents of the Internal Revenue Bureau. The import of the decisions in the Burdick and Montgomery cases, *supra,* is that failure to warn the defendants of their constitutional rights before questioning them as to their potential tax liability does not *per se* and as a matter of law render their admissions involuntary."

The Ninth Circuit Court of Appeals passed upon a tax case in 1955 and its decision in that case is really dispositive of appellant's contentions here. In *Legatos v. United States,* 222 F. 2d 678 (C. A. 9, 1955), the court said (p. 683):

> "Legatos further complains that he was misled into believing that only a routine, civil liability, investigation was being made of his tax returns and that he was not informed until after his voluntary disclosure that criminal prosecution was contemplated. . . . Usually, when an investigation is started, it is not possible to predict where it will lead or whether or not evidence of fraud sufficient to justify prosecution will be uncovered. . . . No government agent made any promise of immunity from prosecution to appellants, or gave them any good reason to believe that prosecution would not be instituted. And since appellant Glynn gave the challenged documentary evidence to a government agent before any effective voluntary disclosure had been made, no constitutional rights of appellants were violated. [citations.]"

For other cases to the same effect see:

Vloutis v. United States, F. 2d 782 (C. A. 5, 1955);

Benes v. Canary, 224 F. 2d 470 (C. A. 6, 1955);

Scanlon v. United States, 223 F. 2d 382 (C. A. 1, 1955).

Appellant's entire argument in this case rests upon the assumption that it is unlawful to obtain evidence from a taxpayer's own words, acts and records without advising him that he is under a criminal investigation, if such be the case. This is certainly not the law. As expressed by the Seventh Circuit Court of Appeals in *United States v. O'Brien,* 174 F. 2d 341, 346 (1949):

> ". . . police officers are not required to be too polite. They may match wits with alleged criminals, and in the absence of coercive, abusive tactics, obtain evidence for use in the prosecution."

In *On Lee v. United States,* 343 U. S. 747 (1952), while the defendant was on bail an old friend and former employee went to the defendant's place of business. He entered the defendant's establishment with a microphone concealed upon his person and engaged the defendant in conversation. The Supreme Court held that the defendant's incriminating statements made during that conversation were admissible evidence. It goes without saying that the defendant was not advised that he was giving evidence against himself in a criminal case. On the subject of suppressing evidence generally, the court observed at page 757:

> "The trend of the law in recent years has been to turn away from rigid rules of incompetence, in favor of admitting testimony and allowing the trier of fact judge the weight to be given it."

In this case, government agents even met the more rigorous standard of the dissenters in *On Lee.* The dissenters do not suggest that evidence should be excluded which was obtained by a law enforcement officer while observing and listening on premises he lawfully entered.

See also:

Goldman v. United States, 316 U. S. 129;

Olmstead v. United States, 277 U. S. 438.

Appellant cites many cases in his brief in an attempt to demonstrate that he was the victim of an unlawful search. But the cases relied upon either involve a "masquerade",

Catalanotte v. United States, 208 F. 2d 264 (6 Cir., 1953);

Gouled v. United States, 255 U. S. 298 (2 Cir., 1921),

or they involve a consent to search obtained by duress or coercion.

Judd v. United States, 190 F. 2d 649 (C. A. D. C., 1951).

Nowhere in the record of this case is there a suggestion that Agent Weiss represented himself to be anything but a government agent, and nowhere in the record is there a suggestion that the appellant was forced or coerced into making his books available to the agents.

Against this background of case law the district court correctly ruled [Tr. p. 53]:

> "(9) that assuming all of plaintiff's allegations to be true, and in particular that Special Agent Weiss knew that fraud was suspected but did not inform plaintiff that the purpose of the investigation was to acquire evidence for a criminal prosecution, nevertheless plaintiff's constitutional rights to be free from 'unreasonable searches and seizures' and from being 'compelled . . . to be a witness against himself' were not violated [U. S. Const., Amend. IV, V]; and

"(10) that 'even if the Government Agents obtained the voluntary disclosures . . . by the guile of a false representation that no investigation was pending . . . it could not be said that such a stratagem constitutes an unreasonable search and seizure within the meaning of the Fourth Amendment.' [Chieftain Pontica, Corp. v. Julian, *supra,* 209 F. 2d at 659-660; accord United States v. American Stevedores, 16 F. R. D. 164, 171 (S. D. N. Y. 1954); see Bolles v. Chew, 53 F. Supp. 787 (N. D. Cal., 1944).]"

No constitutional rights of appellant were violated.

POINT THREE.

Appellant Was Not Erroneously Denied a Hearing by the District Court.

A. There Was Nothing for the Court to "Hear."

Regardless of whether the proceeding in the District Court is viewed as a motion under Rule 41(e) of the Federal Rules of Criminal Procedure or as a civil action terminating in a summary judgment under Rule 56 of the Federal Rules of Civil Procedure, the district court was not called upon to conduct a hearing. It would have been superfluous. The district judge ruled, based on the authorities, "that assuming all of plaintiff's allegations to be true" [Tr. p. 53] none of his constitutional rights were violated. Thus, the court ruled that appellant was not entitled to the relief sought *on his own moving papers.*

But even if the district court had been called upon to decide the motion on affidavit, it would present no innovation in procedure under Rule 41(e). Traditionally,

district courts have determined such motions in that manner. As expressed by the District Judge in this case [Supp. Tr. p. 2].

> ". . . the court may, if it decides it is desirable, take oral testimony."

In his brief at page 31, appellant cites the case of *United States v. Manno* (D. C. Ill., 1954), 118 Fed. Supp. 511, in support of a different proposition. But the court's language at page 516 as quoted by appellant should receive careful attention:

> "In the opinion of the Court, this controversy needs to be resolved by evidentiary proof."

Thus, the court in the *Manno* case is really saying the same thing as the District Judge in this case. The court does not say that there *must* be evidentiary proof but only that he deems it desirable in that case.

Appellant also seeks to rely upon the case of *United States v. Warrington,* 17 F. R. D. 25, which disapproves use of affidavits in motions under Rule 41(e). But appellant himself selected the course of action in the instant case when, contrary to *Warrington,* he filed an initial affidavit in support of his motion. [Tr. p. 10.]

B. Appellant Was Afforded an Opportunity for a Hearing and Waived It.

The Supplemental Transcript of Record, pages 2 and 3, reveal that an opportunity to produce oral testimony was given appellant and he declined to take advantage of it. The transcript reveals, page 2, that counsel for defendants offered to produce oral testimony, and opportunity to

cross-examine, from the persons who had made affidavits in the case. The court then addressed counsel for appellant:

"The Court: Do you wish to examine them?

Mr. Laven: Well, I presume this is on affidavit. These motions are usually . . .

. . . . . .

Mr. Laven: I don't wish to cross-examine on their affidavits that they made . . ."

Thus, appellant was given an opportunity for the hearing he now complains was denied him.

VI.
CONCLUSION.

No constitutional rights of appellant were violated and the judgment of the District Court should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
Assistant United States Attorney,
Chief, Criminal Division,

CECIL HICKS, JR.,
Assistant United States Attorney,

Attorneys for Appellee,
United States of America.